Filed 8/14/09 P. v. Frey CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRANDON SCOTT FREY, Defendant and Appellant.	B207591 (Los Angeles County Super. Ct. No. SA060753)

APPEAL from a judgment of the Superior Court of Los Angeles County. Scott T. Millington, Judge. Affirmed.

Howard R. Price for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

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Brandon Scott Frey (appellant) appeals from the judgment (order granting probation) entered following a court trial in which he was convicted of assault with a deadly weapon or by means of force likely to produce great bodily injury, in violation of Penal Code section 245, subdivision (a)(1).[1] He contends that the evidence is insufficient to support the judgment because it fails to demonstrate that he used a deadly weapon or instrument to commit the assault.

We find no merit to the contention and affirm the judgment.

FACTS

The Prosecution's Case-in-Chief

Viewed in the light most favorable to the judgment (*People v. Lewis* (2008) 43 Cal.4th 415, 432), the evidence established that just after midnight on January 20, 2006, Alexander Merino (Merino) and Rena Baum (Baum) were walking away from the door of the Saints and Sinners Bar on Venice Boulevard in Los Angeles on their way to a friend's residence. A car drove dangerously close to them and then stopped. Annoyed or angry, Merino knocked on the trunk of the car.

Appellant, the driver, quickly emerged from his car holding something that looked like a club or pipe that was eight to twelve inches long and slightly less than one inch thick. Appellant charged at Merino, swinging the object in his hand. Merino put up his arms defensively and attempted to grab appellant's arms to avoid being hit. Appellant and Merino fell to the ground, at which time Merino hit the back of his head on the pavement. Appellant hit Merino forcefully several times on his shoulder, collar area and the top of his head with the object in his hand. On the ground, Merino tried to control appellant's arms, but could not, and appellant repeatedly hit him so that Merino was struck in all some 10 to 20 times. Although appellant was generally on top of Merino when they were on the ground, appellant was able to strike Merino on the back of the head because they were moving around.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Baum ran into the bar to get a friend, who pulled appellant off Merino.

As a result of the assault, Merino suffered two small lacerations on his head. One laceration was near his neck. The other, on the crown of his head, was sustained when he fell backwards to the pavement. Merino went to the hospital. The doctor recommended staples in the laceration on the crown of his head, but Merino declined. Merino's medical records indicated that he told hospital personnel that he had been struck with a billy club. The medical records indicated that Merino stated that he did not lose consciousness during the melee and that apart from the two lacerations he appeared to have no other notable injuries.

Later, Baum took photographs of Merino's head and shoulders, and a few days after the attack Merino sent an e-mail to a detective detailing his injuries with the photographs attached. Merino testified that bruises developed after the photographs were taken and he had bruises on his chest, collar bones, the base of his neck, and right shoulder. Also, the locations where appellant had hit him on his arms hurt. Merino had red marks on his arms, torso, chin, hands and wrists. For three months following the assault, Merino took over-the-counter painkillers.

Merino could not tell exactly what it was that appellant used to assault him. He testified that the item felt as if it were "full," not "hollow," and it was "heavier rather than lighter." He stated, "[I]f it was plastic, it was heavy plastic, or I would be surprised if it wasn't a metal. I think it was a metal." Merino testified that appellant used the object in his hand to commit the assault, not his hands and fists.

Baum corroborated Merino's testimony. She saw appellant charge Merino with an item in his hand that looked like a foot-long, "metal type object, pipe," a "long cylindrical type weapon." The item was approximately the diameter of a broom handle. Baum stated that the item looked as if it was made out of metal, and it did not look like a plastic ruler. She believed the item was a metal bar. She saw appellant hit Merino five or six times before she ran inside the bar. She saw appellant and Merino after they fell to the ground, but could not tell whether at that point appellant was able to land further blows.

Baum said that at the hospital, she observed two small, gaping lacerations on Merino's scalp.

Merino and Baum testified that when appellant stepped out of the car he had the object grasped in one of his hands by the end for leverage. The object was not recovered.

Merino was 6 feet 4 inches tall and weighed 215 pounds. Appellant was 5 feet 9 inches tall and weighed 145 pounds.

The Defense

Appellant's mother and two of his friends testified to appellant's peaceful and nonviolent nature. A coworker of appellant's claimed to have seen the very end of the melee and said that he saw no weapon.

Los Angeles Police Detective Tanya Oglesby testified that she telephoned Merino later on the day of the attack, and he told her that he could not recall anything about the assault. Several days later, Merino sent the detective an e-mail describing the events of the assault.

Appellant, a 30-year-old nightclub soundman, testified that he had driven up to the bar in his car with a female companion. In front of the bar, he heard a "boom," "boom," "boom" on his trunk and got out to investigate. Merino yelled at him, ran up, and punched appellant in the chest. Appellant was unarmed and "scared." He lunged at Merino so as to tackle him. He and Merino fell to the ground and scuffled. Appellant disentangled himself from Merino by wriggling out of his sweatshirt, which Merino had grabbed. When appellant got out of the sweatshirt, a group of young men were standing around them talking. Appellant believed that the young men might be Merino's friends, and he quickly got into his car and drove off. He had dropped his cellular telephone, so he did not telephone the police. After he arrived home, he concluded that the entire confrontation was "trivial," and he did not call the police at that point either. Appellant admitted that at the preliminary hearing, he had presented false evidence of an alibi.

The Verdict

The trial court indicated that it found much of appellant's testimony lacking in credibility. It explicitly rejected appellant's claim that he was unarmed, stating, "I still [defense counsel,] have a hard time getting around why they would make up that the defendant had a weapon. I just can't get around that . . . ." The court further stated, "With regards to all the injuries, I think they support what the victim was saying in that he said he had his hands up to protect himself so maybe that weapon can't hit him so hard." The trial court found appellant "guilty of count 1, Penal Code section 245 (a)(1), assault with a deadly weapon."

As to the great bodily injury allegation, the trial court found that Merino "was exaggerating his injuries." Stating that it found the issue to be a close one, the trial court declined to find true the allegation of the infliction of great bodily injury within the meaning of section 12022.7, subdivision (a).

DISCUSSION

Appellant contends that the evidence is insufficient because it "refutes the very existence of [a] weapon" and it fails to demonstrate the use of a "deadly weapon or instrument" within the meaning of section 245, subdivision (a)(1). This contention must fail.

I. Standard of Review

"'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 118.)

A reviewing court may reject the testimony of a witness who was apparently believed by the trier of fact only if that testimony is inherently improbable or impossible of belief. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a

judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.) "Reversal . . . is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

II. Aggravated Assault

The elements of aggravated assault as defined by section 245, subdivision (a), are (1) that a defendant willfully committed an unlawful act which by its nature would probably and directly result in the application of physical force on another person; (2) he was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; (3) he had the present ability to apply physical force to the person of another; and (4) he committed the assault by means of force likely to produce great bodily injury or used a deadly weapon in the assault. (CALJIC Nos. 9.00, 9.02; *People v. Colantuono* (1994) 7 Cal.4th 206, 213–214 (*Colantuono*).)

"Great bodily injury is significant or substantial injury. [Citation.] Permanent or protracted impairment, disfigurement, or loss of function, however, is not required. [Citation.]" (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1087 (*Beasley*).)

"[C]ourts have construed [a deadly weapon] to mean '"any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." . . . Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. . . . Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the

manner in which it is used, and all other facts relevant to the issue.' [Citation.]" (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1053, 1054.)

"In determining whether an object not inherently deadly or dangerous was used in the requisite manner, the trier of fact may look to the nature of the weapon, the manner of its use, and any other relevant fact. [Citation.] Although neither physical contact nor injury is required for a conviction, if injuries result, the extent of such injuries and their location are relevant facts for consideration. [Citation.]" (*Beasley, supra*, 105 Cal.App.4th at pp. 1086.) The gravamen of the crime is the likelihood that the force applied or attempted to be applied will result in great bodily injury (*Colantuono*, *supra*, 7 Cal.4th at p. 217), and "'[a]ll aggravated assaults are ultimately determined based on the force likely to be applied against a person.'" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1035 (*Aguilar*).)

Moreover, "[t]he offense of assault by means of force likely to produce great bodily injury is not an offense separate from . . . the offense of assault with a deadly weapon." (*In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5.) This is so because, as *Aguilar* reminds us, "'[a] deadly weapon is any object, instrument, or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.'" (*Aguilar*, *supra*, 16 Cal.4th at p. 1037, referring to CALJIC No. 9.02, italics omitted.) Thus, the trial court, as the trier of fact, had to determine whether appellant's "conduct had the capability and probability of inflicting great bodily injury under either a 'deadly weapon' theory or a 'force likely' theory." (*Aguilar*, *supra*, at p. 1037.) The analysis under either theory is the same. (*Ibid*.)

III. The Analysis

Appellant asserts that Merino's testimony concerning his injuries belies that appellant was armed or used a deadly weapon because if he had been armed with such a weapon, the blows to Merino would have caused far more serious injury than set out in Merino's testimony.

The contention that Merino's bruises and lacerations were caused when appellant and Merino scuffled on the ground is merely a request that this court reweigh the evidence. It is well established that that is not the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) Merino's and Baum's testimony concerning appellant's use of the object was not inherently improbable, nor did the testimony amount to a physical impossibility. Substantial evidence, set forth above, supports the trial court's determination that appellant used a deadly weapon.

Further, the trial court's determination that appellant was guilty of aggravated assault is supported by substantial evidence. The evidence established that the object appellant used to strike Merino was "full," not hollow, and "heavier" rather than "lighter." Both witnesses testified that they believed it was metal and that appellant struck Merino forcefully, holding the object at the end for leverage. The testimony thus established that appellant wielded the object in a manner that was likely to produce great bodily injury. Merino's less than catastrophic injuries are readily explained, as the trial court indicated, by Merino's efforts to deflect the blows. Substantial evidence supports the verdict.

Appellant relies on *Beasley*, *supra*, 105 Cal.App.4th 1078, a case in which the reviewing court found the evidence insufficient to support convictions of two counts of aggravated assault. We are not persuaded that *Beasley* compels a different result.

In *Beasley*, the defendant beat the victim with a broomstick on the shoulders in one count of aggravated assault, and he beat the victim with a plastic vacuum hose extension in another count. The reviewing court held that there was insufficient evidence that these objects, as used by the defendant, were capable of causing great bodily injury, and the court reduced the convictions from assault with a deadly weapon to misdemeanor assault. (*Beasley*, *supra*, 105 Cal.App.4th at pp. 1086–1088.)[2]

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[2] The *Beasley* jury was instructed on assault with a deadly weapon but not on assault by means of force likely to produce great bodily injury. Appellant's case was tried to the court, which, as indicated, had to determine whether appellant's "conduct had

The *Beasley* court stated that the victim's testimony "was far too cursory to establish that the broomstick, as used by Beasley, was capable of causing, and likely to cause, great bodily injury or death. Beasley did not strike her head or face with the stick, but instead used it only on her arms and shoulders. She did not describe the degree of force Beasley used in hitting her with the stick, and neither the stick itself nor photographs of it were introduced in evidence. The record does not indicate whether the broomstick was solid wood or a hollow tube made of metal, fiberglass, or plastic. Its composition, weight, and rigidity would necessarily affect the probability and likelihood that it could cause great bodily injury. The jury therefore had before it no facts from which it could assess the severity of the impact between the stick and [the victim's] body. The evidence showed only that Beasley hit her arms and shoulders, caused bruising in those areas. Although extensive, severe bruising, in conjunction with other injuries has been held to constitute great bodily injury [citations], bruises on [the victim's] shoulders and arms are insufficient to show that Beasley used the broomstick as a deadly weapon." (*Beasley*, *supra*, 105 Cal.App.4th at pp. 1087-1088.)

Although here, as in *Beasley*, the object was not introduced into evidence, we do not find that Merino's and Baum's testimony was too "cursory" to permit the determination that the object appellant used to attack Merino was capable of causing, and likely to cause, great bodily injury. Merino testified that he thought the object was metal and Baum testified that it looked as if it were made from metal. Unlike the broomstick in *Beasley*, the object used by appellant was specifically described as "full," not hollow. The object was either a foot long or eight to 12 inches long and appellant held it at the end to obtain leverage and struck Merino with force. The trial court was well able to "assess the severity of the impact between the [object] and [Merino's] body." (*Beasley*, *supra*, 105 Cal.App.4th at p. 1088.) Appellant struck Merino on the head, resulting in the

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the capability and probability of inflicting great bodily injury under either a 'deadly weapon' theory or a 'force likely' theory." (*Aguilar*, *supra*, 16 Cal.4th at p. 1037.)

laceration that prompted a physician to suggest staples. As the trial court observed, the lesser magnitude of the injuries was explained by Merino's efforts to protect himself from appellant's attack. In contrast to *Beasley*, the record here contains substantial evidence to support the trial court's determination of appellant's guilt of aggravated assault.

DISPOSITION

The judgment (order granting probation) is affirmed.

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_____, P. J.

BOREN

I concur:

_____, J.

CHAVEZ

DOI TODD, J.—Dissenting

I dissent. The evidence fails to support appellant's conviction of aggravated assault, and the judgment should be modified to reflect a conviction of the lesser included offense of misdemeanor assault.

I agree with the majority that, contrary to appellant's claim, the evidence supports the trial court's determination that appellant used a weapon. However, I believe the evidence fails to establish that appellant committed assault with a deadly weapon or by means of force likely to produce great bodily injury within the meaning of Penal Code section 245, subdivision (a)(1).

"Penal Code section 245, subdivision (a)(1) penalizes the commission of an assault 'with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury.' A deadly weapon may be any object, instrument, or weapon used so as to be capable of producing, and likely to produce, death or great bodily injury. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.) In determining whether an object not inherently deadly or dangerous was used in the requisite manner, the trier of fact may look to the nature of the weapon, the manner of its use, and any other relevant fact. (*Id.* at p. 1029.) Although neither physical contact nor injury is required for a conviction, if injuries result, the extent of such injuries and their location are relevant facts for consideration. [Citation.] [¶] Great bodily injury is significant or substantial injury. [Citation.]" (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 (*Beasley*).)

In *Beasley*, the defendant was convicted of aggravated assault after he beat the victim, Garrido, with a broomstick on the arms and shoulders. Division Eight of this District held that there was insufficient evidence that this object, as used by the

defendant, was capable of causing great bodily injury. (*Beasley, supra*, 105 Cal.App.4th at pp. 1086–1088.)[1]

The *Beasley* court explained, "It is certainly conceivable that a sufficiently strong and/or heavy broomstick might be wielded in a manner capable of producing, and likely to produce, great bodily injury, e.g., forcefully striking a small child or a frail adult or any person's face or head. (See, e.g., *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835-836 [multiple hard blows to six year old with wooden dowel one inch in diameter, causing swelling and severe discoloration visible the next day established great bodily injury for purposes of Pen. Code, § 12022.7 enhancement].) Garrido's testimony, however, was far too cursory to establish that the broomstick, as used by Beasley, was capable of causing, and likely to cause, great bodily injury or death. Beasley did not strike her head or face with the stick, but instead used it only on her arms and shoulders. She did not describe the degree of force Beasley used in hitting her with the stick, and neither the stick itself nor photographs of it were introduced in evidence. The record does not indicate whether the broomstick was solid wood or a hollow tube made of metal, fiberglass, or plastic. Its composition, weight, and rigidity would necessarily affect the probability and likelihood that it could cause great bodily injury. The jury therefore had before it no facts from which it could assess the severity of the impact between the stick and Garrido's body. The evidence showed only that Beasley hit her

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[1] Although in *Beasley* the jury was instructed only on assault with a deadly weapon and not on assault by means of force likely to produce great bodily injury, "[t]he offense of assault by means of force likely to produce great bodily injury is not an offense separate from . . . the offense of assault with a deadly weapon." (*In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5.) This is so because, as *Aguilar* reminds us, "'[a] deadly weapon is any object, instrument, or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.'" (*People v. Aguilar*, *supra*, 16 Cal.4th at p. 1037, referring to CALJIC No. 9.02, italics omitted.) Thus, the trial court here had to determine whether appellant's "conduct had the capability and probability of inflicting great bodily injury under either a 'deadly weapon' theory or a 'force likely' theory." (*People v. Aguilar*, *supra*, at p. 1037.) The analysis under either theory is the same. (*Ibid*.)

arms and shoulders, caused bruising in those areas. Although extensive, severe bruising, in conjunction with other injuries has been held to constitute great bodily injury [citations], bruises on Garrido's shoulders and arms are insufficient to show that Beasley used the broomstick as a deadly weapon." (*Beasley, supra*, 105 Cal.App.4th at pp. 1087–1088.)

The evidence here, as in *Beasley*, was insufficient to support a finding that the object was wielded by appellant in a manner capable of causing, and likely to cause, great bodily injury. As in *Beasley*, neither the weapon nor photographs of it were introduced in evidence. Merino testified that the object was heavier rather than lighter and full rather than hollow, but these are simply relative terms, and neither Merino nor Baum could describe the object such that the trial court could "assess the severity of the impact between the [object] and [Merino's] body." (*Beasley, supra*, 105 Cal.App.4th at p. 1088.)

As the *Beasley* court indicated, the trier of fact may consider the extent of the injuries and their location in considering whether an object was used so as to be capable of producing and likely to produce great bodily injury. (*Beasley, supra*, 15 Cal.App.4th at p. 1086.) Merino, unlike the victim in *Beasley*, did suffer a small laceration on the head near his neck that apparently was caused by the object, rather than by his fall. However, this laceration and the bruises he claimed to have suffered, none of which was around his face or head, were insufficient to establish that the object was wielded in a manner that was capable of producing, or likely to produce, death or great bodily injury.

The evidence is thus insufficient to support the conviction of aggravated assault. I would modify the judgment to reflect a conviction of the necessarily included offense of misdemeanor assault in violation of Penal Code section 240. (*Beasley, supra*, 105 Cal.App.4th at p. 1088.)

_____, J.

DOI TODD